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No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the ALIEN PROPERTY CUSTODIAN, ET AL., *Petitioners*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL., and ELLIS G. KAUFMAN, ET AL., ERNEST ATTENHOFER, ET AL., ANNA MAUL RUCH KETTLER, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, ERNEST ATTENHOFER, ET AL., IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (J.A.[1] 147-152) is unreported.

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[1] "J.A." refers to the Joint Appendix filed in the court below.

The opinion of the Court of Appeals is reported at 278 F. 2d 268.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960. A petition for re-hearing *en banc* was denied on May 11, 1960. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Black, on August 4, 1960, to and including September 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the refusal of the courts below to modify a prior order referring the case to a Special Master with the responsibility for making findings of fact and conclusions of law subject to the requirements of Rule 53 of the Federal Rules of Civil Procedure constituted an abuse of discretion.

RULE INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

* * * * *

> (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

* * * * *

STATEMENT

Respondent Societe Internationale etc., a Swiss Corporation known as Interhandel, filed suit in the United States District Court for the District of Columbia in October, 1948 under Section 9(a) of the Trading with the Enemy Act, as amended, [40 Stat. 419, as amended, 50 U.S.C. App. 9 (a)], to recover property vested by petitioner's predecessors consisting of approximately 93% of the stock of General Aniline and Film Corporation and certain cash in New York banks of a total value in excess of $100,000,000 (J.A. 17-33). Petitioners' Answer denied respondent's claim of ownership, alleged that respondent is an enemy and or enemy-tainted and asserted certain counterclaims for unpaid taxes, etc.

On January 18, 1949, petitioners moved for the designation of a judge to hear and superintend all matters in this case preliminary to trial (J.A. 56-57). This motion was not acted on until July 5, 1949, at which time it was denied without prejudice (J.A. 64).

Meanwhile, in April, 1949, during hearings on motions relating to discovery and depositions in connection therewith, the late Chief Judge Bolitha J. Laws *sua sponte* suggested the appointment of a special master (J.A. 67-74).

Petitioners' counsel warmly embraced the Chief Judge's suggestion (J.A. 67-74). Chief Judge Laws scheduled a hearing for February 6, 1950, at which time he stated he would hear both sides with respect to the appointment of a special master (J.A. 65-66).

On February 13, 1950, counsel for petitioners wrote Chief Judge Laws a letter stating petitioners were

"glad" to note their consent to the proposed order and suggesting that Chief Judge Laws might wish to amplify the order by providing that the master's report should contain findings of fact and conclusions of law and that it might serve to clarify the order if the court would add to it a provision that the master's findings of fact shall have the force provided in Rule 53 (e) (2) (J.A. 162-164).

Thereafter, on February 14, 1950, Chief Judge Laws signed an order appointing William J. Hughes, Jr., a lawyer of great experience and recognized ability, as Special Master with the full consent and enthusiastic endorsement of petitioners. (J.A. 162).

Shortly thereafter, Mr. Hughes commenced his duties as Special Master and has ably and conscientiously functioned in that capacity to the present time. On January 4, 1951, Chief Judge Laws designated Judge (now Chief Judge) David A. Pine as the District Judge specially assigned to hear proceedings in this case.

On March 14, 1950, some 16 months after this litigation had commenced, respondents Kaufman, et al. sought to intervene in the suit alleging that respondent Interhandel was entitled to the return of that portion of the vested property which is proportionate to the interest in the Corporation held by non-enemies even if the Corporation were ultimately determined to be enemy or enemy-tainted. The District Court denied the Kaufman motion to intervene, the Court of Appeals affirmed (88 U.S. App. D.C. 296, 188 F. 2d 1017) and this Court reversed directing that Kaufman's derivative complaint in intervention be filed. 343 U.S. 156.

On June 16, 1952, respondents Attenhofer, et al. filed a motion to intervene (J.A. 4). Attenhofer and their adherents were permitted to intervene and on August 14, 1952, their complaint was filed (J.A. 5). Thus, the Special Master had already functioned for nearly two years before respondents Attenhofer, et al. became parties to the litigation.

Counsel for respondent Interhandel originally opposed the reference of this case to a Special Master (J.A. 76-78); and on February 19, 1951, over a year after the Special Master was appointed, again moved to vacate the order of reference (J.A. 80-83, 165). Petitioners opposed this new motion by respondent Interhandel and again embraced and endorsed Chief Judge Law's action in having signed the order of reference (J.A. 84-85). This latter motion of respondent Interhandel's was apparently overlooked by all concerned and no order was entered expressly overruling it. However, the motion was abandoned in the same year of 1951 and respondent Interhandel, as well as all other parties, have acquiesced in the appointment and functioning of the special master during the nearly nine years in which the case has been pending since that time (J.A. 137-138).

The Special Master has devoted a substantial amount of time to this case and has gained great familiarity with its complexities since the order of reference was signed. He has dealt with both substantive and procedural questions (J.A. 2-16, 87, 99, 102, 105, 112, 123, 125).

ARGUMENT

Petitioners' Contention

Certiorari is sought in this case to review the action of the District Judge denying a modification of an order of reference under Rule 53(b) of the Federal Rules of Civil Procedure, which had been in effect for over eight years. Respondents had heretofore believed, as did the Court of Appeals, that petitioners were grounding their appeal from the District Judge's action on a claim of abuse of discretion. However, since petitioners now claim (Pet., p. 12) the District Judge did not exercise discretion and that the Court of Appeals indulged an "assumption", we respectfully invite this Court's attention to the record.

In oral argument before the District Judge, petitioners' attorney stated: "* * * I am asking in the discretion of the Court that an order be made here * * *." (J.A. 145). He also stated "* * * I ask you in exercising your discretion * * * that you modify the order * * *." (J.A. 146) He stated "I am asking for a modification in the discretion of the Court" (J.A. 147). He finally stated: "* * * Coming now to the legal points involved, they hinge on the abuse of discretion" (J.A. 152). Furthermore, the District Judge made it clear in his opinion (J.A. 150) that he was exercising his discretion in denying petitioners' motion.

The District Judge Did Not Abuse His Discretion

There is no history in the District of Columbia of District judges generally or of the late Chief Judge Laws in particular indulging in the bad habit of promiscuously referring cases to masters. Even petitioners concede that "Judge Laws did not reach his

decision lightly." (Pet. p. 9). Thus, one of the main concerns confronting this Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, is lacking in this case.

More importantly, the instant case is clearly distinguishable from *La Buy* on factual grounds. The situs of *La Buy* was in the United States. Its parties resided in the United States, its witnesses were located in the United States,[2] its documents were to be found in the United States, and its issues involved typical and ordinary business transactions in the United States under American laws. *La Buy* was an anti-trust case and such cases are relatively common in those federal district courts located in our larger cities. In addition, although a detailed accounting might have been required were liability to be established, it would have been an accounting which was ancillary to the other and major issues of the case.

The majority of the Court of Appeals quite properly found the case at bar to be vastly dissimilar to *La Buy* and found that the District Judge exercised a proper discretion in refusing to modify the order of reference. For example, the instant case has its true situs in Europe and other foreign countries. Respondent Interhandel is a Swiss corporation located and domiciled in Basel, Switzerland. Its books, records, officers and employees are located in Switzerland. Petitioners' Answer to the Complaint charges (J.A. 48) a 17-year history of dealing with German and other European individuals and business entities amounting to a "conspiracy or common plan * * * to conceal, camouflage and cloak the ownership, control, and domination by

[2] Most of them apparently were in and about the City of Chicago. See Transcript of Record, No. 27, October Term, 1956, pp. 59 to 130.

I. G. Farben of properties and interests in many countries of the world * * * "

It has been estimated there will be upwards of 100 witnesses whose testimony will be produced and over 250,000 documents, many of them handwritten and most of them in foreign languages, will have to be inspected. The vast majority of these witnesses and documents are located abroad. The subpoena power of the District Court cannot reach those that are not in Respondent Interhandel's custody or control. Obviously, a district judge cannot journey abroad to supervise and try various aspects of a case where his presence would further the interests of justice. The Special Master, on the other hand, can and will go wherever the exigencies of the case require him to be.

Petitioners Answer to the Complaint also raises another important consideration which differentiates the case at bar from *La Buy*. Petitioners deny respondent Interhandel's ownership of the claimed General Aniline shares. Behind this claim of ownership are a large number of intricate transactions between numerous persons involving millions of dollars which will have to be carefully traced through accounting evidence. This question of ownership of the vested property is, under Section 9(a) of the Trading With The Enemy Act, *supra*, one of the basic issues in the litigation—it is not, as in *La Buy*, ancillary to the main case.

An additional complexity is presented by the large number of parties, the vast majority of whom reside abroad. As of March 31, 1954, over 2400 separate individuals had intervened as parties. Over 700 of these have since been dismissed from the the litigation. Peti-

tioners have addressed separate sets of interrogatories to each of these intervenors and, in a large number of instances, have served supplemental interrogatories. The Special Master has presided over numerous hearings relating to objections to interrogatories alone. While it is true this Court did not consider the presence of 87 plaintiffs, without more, in *La Buy* a serious complexity, surely one reaches a point sooner or later where mere numbers do become complex. It is respectfully submitted any figure in excess of 2000 parties must be in this area.

It is clear from the language of Rule 53 that a reference to a Master is appropriate when exceptional conditions require it. We submit that the facts of this case clearly demonstrate the exceptional conditions contemplated by the rule. The Court of Appeals was entirely right when it said, "We think that if ever there is to be a case presenting itself as 'the exception and not the rule', it is this one." 273 F. 2d 268, 271.

The Status of the Special Master

Petitioners suggest, in broad general phraseology, that since this case is still in the discovery stage the Special Master has not done much of significance. We do not believe they seriously suggest he has not gained extensive familiarity with the case.

For example, the Special Master presided over the deposition of Dr. Hans Sturzenegger which required some 60 days to complete, covered some 6000 pages of testimony and involved some 700 documents. He conducted lengthy hearings during which a great deal of evidence was taken as to the good faith of respondent Interhandel in its efforts to comply with Chief Judge

Laws' order of July 5, 1949, to produce what were referred to as the "Sturzenegger Papers".[3]

In addition to the problems of the corporate litigation, the Special Master has, since the admission of the more than 2400 intervenors beginning in 1952, conducted in excess of 20 separate hearings relating to the complicated and involved problems of the respondent intervenors, Kaufman, Attenhofer, Klinger, et al. (J.A. 2-16). These hearings have covered some 1700 pages of transcript and in conjunction therewith the Special Master has written a number of lengthy and scholarly opinions and signed numerous orders (J.A. 87, 99, 102, 105, 12, 123, 125). He has dealt with both substantive and procedural questions. He has signed orders permitting parties to intervene; he has signed orders dismissing parties from the litigation; he has considered such varied questions as the propriety of interrogatories and the necessity for testimony in foreign lands by means of Letters Rogatory; he has fixed a "bar date" prohibiting further intervention; and he has ruled on the applicability of the Anti-Assignment statute (R.S. 3477) and thus determined whether substantial numbers of intervenors were to be dismissed from the litigation.

Petitioners' argument (Pet. p. 12) that there has been a significant change of circumstances since the order of reference was signed is, in reality, an afterthought which was not argued to the District Judge. The argument was had on February 6, 1959 (J.A. 136). Thereafter, on March 9, 1959, at a subsequent hearing during which the order was presented, petitioners' counsel for the first time took the position (J.A. 152-

[3] This was done under an order signed by Chief Judge Laws on March 1, 1951. (J.A. 86).

154) that Mr. Justice Harlan in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 213, pronounced, in effect, new law when he stated "It may be that in the absence of complete disclosure by * * * [Interhandel] the District Court would be justified in drawing inferences unfavorable to * * * [Interhandel] as to particular events."

It is respectfully submitted that the quoted language pronounced neither new law nor unknown doctrines relating to inferences which may be drawn when there is a lack of evidence or proof. On the contrary, this language is both familiar and agreeable to lawyers.

CONCLUSION

The District Judge carefully weighed the considerations relating to the motion seeking revocation of the order of reference. He found no reason, either in law or in fact, sufficiently persuasive to convince him to modify the order of reference. Petitioners have presented nothing to this Court which even remotely sustains the charge of abuse.

The petitioner for a writ of certiorari should be denied.

Respectfully submitted,

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